IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2250 of 1999
with
CIVIL APPLICATION NO. 6239 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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FOOD CORPORATION OF INDIA

Versus

VIRAMGAM NAGAR PALIKA

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Appearance:

MR NAVIN K PAHWA for Petitioner

MR A.J. PATEL WITH MR. MB FAROOQUI for Respondent No. 1

MS. HARSHA DEVANI, AGP, for Respondent No. 2, 3, 4

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 29/10/1999

C.A.V. JUDGEMENT

The prayers of the petitioner Food Corporation of India in this writ petition are two fold. The first prayer is that a writ of mandamus be issued directing respondent Viramgam Nagar Palika to pay an amount of Rs. 23,62,500/- together with interest at the rate of 24 per

cent per annum with effect from 4.10.1995 till the amount is actually paid to the petitioner Corporation. The second prayer is for writ of mandamus directing the Collector, Ahmedabad, to recover the aforesaid amount as arrears of land revenue under the provisions of the Bombay Land Revenue Code and pay the same to the petitioner Corporation.

2. The brief facts giving rise to this writ petition are as under:-

3. The petitioner Corporation paid a sum of Rs. 23,62,500/- as property tax by way of demand draft in favour of the respondent Nagarpalika under mistaken belief that the godown of the petitioner Corporation is situated within the limits of the respondent Nagarpalika. Immediately the petitioner realised its mistake that the godown is not situated within the limits of the Nagarpalika. Consequently, the petitioner demanded refund of the amount from the Nagarpalika but the Nagarpalika declined to refund the amount to the petitioner. Accordingly, the petitioner filed an appeal under Section 258 of the Gujarat Municipalities Act, 1963 for quashing the decision of the Nagarpalika and for direction to refund the amount to the petitioner Corporation. The Collector after hearing the parties held that the godown is situated outside the limits of the respondent Nagarpalika but he refused to pass order for refund under the belief that he has no power to issue directions for the refund of the amount as the same is already paid and deposited with the Nagarpalika. Feeling aggrieved the petitioner filed Special Civil Application No. 4795 of 1998 in this court. A Division Bench of this court on 29.9.1998 quashed the order of the Collector dated 29.3.1997 and directed the Collector to decide the question of refund of the amount within two months in accordance with law. The Collector after hearing the parties held on 5.1.1999 that the Nagarpalika is liable to pay amount of Rs. 23,62,500/- to the petitioner Corporation. Despite the order of the Collector, the Nagarpalika did not pay the amount to the petitioner. The petitioner thereafter sent a letter to the Nagarpalika to refund the amount together with interest but again neither refund was made nor any reply was given by the Nagarpalika. Two reminders dated 15.1.1999 and 27.1.1999 were also issued by the petitioner to the Nagarpalika but with no result. The petitioner sent a letter to the Collector requesting him to initiate appropriate action for the refund of the amount on 9.2.1999 but with no result. On 18.2.1999 reminder letter was sent to the Collector but again

nothing was done by the Collector. Accordingly, this writ petition was filed.

4. A short counter-affidavit dated 6.5.1999 was filed by the Nagarpalika inter alia pleading that the petition is not maintainable inasmuch as Nagarpalika has filed an appeal against the Collector's order before the Director of Municipalities under Section 258(3) of the Gujarat Municipalities Act. During the pendency of the writ petition the said appeal was dismissed by the Director of Municipality on 26.5.1999.

5. A detailed counter affidavit was filed on 6.10.1999, wherein it was inter alia pleaded that the writ petition is not maintainable for several reasons, namely the writ petition involves disputed questions of fact which cannot be decided in such writ petition under Article 226 of the Constitution of India. A new case has been taken up in the detailed counter affidavit that the amount was paid by the Corporation towards welfare funds to Viramgam Nagarpalika and whatever amount was paid was paid with an open eye that it will be utilised towards welfare funds and it was so utilised for the welfare of the people of Viramgam Town. Hence the petitioner is estopped from taking the plea that the Nagarpalika is bound to refund the said amount paid and utilised towards welfare fund. Another plea is that the roads of the municipality were used mainly by the petitioner for passing its trucks to and fro the godowns and the heavy vehicles had caused damage to the roads for which the municipality had to spend huge amount, hence also Food Corporation of India is not entitled to any refund. It is also pleaded that under Section 72 of the Indian Contract Act, the claim of the petitioner Corporation could be raised before the Civil Court and not before the High Court under Article 226 of the Constitution of India. Another plea is that 31 per cent of the amount so claimed by the petitioner was already paid to Ganesh Enterprise at the request and at the instance of the Food Corporation India, hence there is no question of making any refund. The last plea is that the Nagarpalika is contemplating to file some writ petition against the order of the Collector duly affirmed by the Director of Municipalities. Hence this petition is premature and deserves to be dismissed.

6. It would not be out of place to mention that in this writ petition an order was passed by this court that the respondent No. 1 Municipality shall deposit the entire amount in dispute in this court on or before 21.6.1999. Thereafter, till date no amount has been

deposited in this court. On the contrary, the Nagarpalika preferred Letters Patent Appeal No. 819 of 1999 against the order dated 10.5.1999 which was also dismissed by a Division Bench of this court on 27.9.1999 with certain significant observations. It is also noteworthy that having failed to deposit the amount directed by this Court in its order dated 10.5.1999, Civil Application No. 6239 of 1999 was moved for granting extension of time for four months which was subsequently altered to six months. That Civil Application is also pending. It is therefore proposed to decide the Special Civil Application and the Civil Application No. 6239 of 1999 by common order.

7. The learned counsel for the respondent Nagarpalika raised certain preliminary objections to the maintainability of this writ petition. The first objection has been that the petition under Article 226 of the Constitution of India cannot be filed as proceedings for recovery of certain amounts ordered to be refundable to the petitioner and as such the writ petition cannot be a substitute for recovery proceedings. The second preliminary objection has been that there is alternative remedy by filing a Civil Suit in a competent court and if such Civil Suit is filed, several defences which would be available to the Nagarpalika could be raised there and in this writ petition writ of mandamus for refund of the amount directed by the Collector cannot be issued. The third preliminary objection was that the matter does not arise under the Bombay Land Revenue Code and as such the second relief of mandamus to the Collector to proceed to recover the amount as arrears of land revenue also is misconceived and cannot be granted by this court.

8. Learned counsel for the petitioner was asked to point out how relief (B) in the writ petition can be granted. For this he wanted time to go through the provisions of the Food Corporation of India Act and Rules framed thereunder. On the concluding day of arguments he admitted that there is no mention either under the F.C.I. Act or under the Rules framed thereunder making provision that the amount payable to the Food Corporation of India can be recovered as arrears of land revenue. If there is no such provision under the F.C.I. Act, no such direction in the nature of mandamus can be issued to the Collector directing for initiating recovery proceedings. Needless to say that F.C.I. Act is a special Act and unless there is provision for recovery proceedings as arrears of land revenue, under the special enactment no direction for proceeding to recover the amount due in favour of the petitioner as arrears of land revenue can

be issued. The request for issuing mandamus under the provisions of the Bombay Land Revenue Code is also misconceived because the order of the Collector and the Director of Municipalities was not passed under the provisions of the Bombay Land Revenue Code. The situation would have been different if the impugned orders would have been passed under the provisions of the Bombay Land Revenue Code. Consequently the recourse of recovery proceedings provided under the Bombay Land Revenue Code cannot be used in the instant case to the rescue of the petitioner. Thus, this preliminary objection succeeds and relief (B) cannot be granted in this writ petition.

9. The next preliminary objection has been that the petition under Article 226 of the Constitution cannot be a substitute for recovery proceedings nor it can be substitute for execution proceedings and the third preliminary objection has been that the alternative remedy of filing Civil Suit should have been exhausted by the petitioner before filing this writ petition and if Civil Suit would have been filed the Nagarpalika would have been in a position to raise all the defences available to it in the said suit. Learned counsel for the petitioner with a view to meet these two objections pointed out that he should be permitted to argue the petition on merits so that the entire facts can be brought to the notice of this court to appreciate these preliminary objections.

10. From the material on record there is clear indication that the intention of the respondent Nagarpalika right from the beginning has been to go on flouting the orders of the Collector, Director of Municipalities and the orders of this court. All possible objections had been raised at intervals by the Nagarpalika. In the short counter affidavit dated 6.5.1999 it was pleaded that because an appeal has been filed before the Director of Municipalities under section 258(3) of the Gujarat Municipalities Act, the writ petition is premature and deserves to be dismissed. However, the writ petition remained pending and the said appeal was dismissed by the Director of Municipalities on 26.5.1999. This petition was filed on 30.3.1999. The petition was admitted on 31.3.1999. Notice was issued to the respondents. Direction was given that the parties shall come ready on 9.4.1999 for final hearing of the petition. However, it could not be taken up on 9.4.1999. On 10.5.1999 information was given by the learned counsel for the respondent No. 1 that the appeal before the appellate authority was fixed for hearing on 17.5.1999.

Accordingly the petition was adjourned to 21.6.1999. An order was passed on this date directing the municipality to deposit entire amount in dispute in this court on or before 21.6.1999. Compliance of this order was also not made by the respondent. Instead, the respondent No. 1 preferred Letters Patent Appeal No. 819 of 1999. That L.P.A. was dismissed on 27.9.1999. The order of the L.P.A. inter alia indicates that submission was made by the learned counsel for the Nagarpalika that at the most the Nagarpalika would be in a position to pay Rs. 25,000/- per month and that the Nagarpalika has no objection if direction is given to the Government to release grant so as to enable the Nagarpalika to pay from the said amount. This submission before the Division Bench of this court clearly shows that due to poor financial condition of the Nagarpalika a request was made for payment of the amount in monthly instalment of Rs. 25,000/-. It was also stated that there was an agreement between the Food Corporation of India and the Nagarpalika and on that basis the Nagarpalika decided to pay Rs. 25,000/- per month. This statement was not believed by the Division Bench and it observed that there was nothing on record to show that such agreement was arrived at between the parties. The Division Bench also did not consider it fit to grant facility of paying the amount in instalment of Rs. 25,000/- per month nor any direction was given by the Division Bench to the State Government for grant of additional fund to the Nagarpalika. Even after this unsuccessful litigation the respondent No. 1 did not pay any amount either to the petitioner nor did it deposit any amount in this court in compliance of the order dated 10.5.1999. The intention is therefore obvious that the respondent No. 1 does not want to pay any amount to the petitioner.

11. Out of the three preliminary objections, one preliminary objection has been decided in the foregoing portion of this judgement. It has been held that no writ of mandamus can be issued directing the Collector to recover the amount as arrears of land revenue because the matter does not fall under the Bombay Land Revenue Code and secondly there is no provision in the F.C.I. Act that the dues of the Corporation can be recovered as arrears of land revenue.

12. In order to appreciate the remaining preliminary objections, it would be just and proper to look into the doctrine of judicial precedents as is applicable in India. In short, the doctrine of judicial precedents applicable is that a judgement of the Supreme Court is binding on all the courts in India. The judgement of the

Supreme Court means not only the ratio of a particular judgement but even obiter dicta in particular judgement rendered by the Supreme Court is binding on all the courts in India. As against this, the obiter dicta of a High Court may it be contained in the judgement of the Full Bench or a Division Bench is not binding on the single Judge of that court nor such obiter dicta of the Full Bench, Division Bench or single Judge is binding on all courts subordinate to a particular High Court. It is only the ratio of a particular case decided by the High Court which is binding on all the courts subordinate to it. Likewise the decision of a Full Bench of a High court is binding on Division Bench as well as on a single judge. Similarly, the decision rendered by a Division bench of the High Court is binding on the single Judge of the same High Court. There can be no deviation from this settled principle of judicial precedents as is applicable in the country. Any deviation is bound to work adversely to the settled principle of judicial precedents in the country. Further the decision between the same parties rendered by the Division Bench of the High Court in Special Civil Application No. 4795 of 1998 is not only binding on the parties but also on a single judge of that court who cannot examine the correctness of such judgement rendered by a Division Bench of the High Court.

12.1 One of the preliminary objections of learned counsel for the respondent Shri A.J. Patel has been that the matter arises out of the contract entered into through correspondence and as such if there has been breach of contract the remedy lies in Civil Court and the aggrieved party, namely, the petitioner should have filed a civil suit where the respondent No. 1 could have raised all possible defences to such suit. It was attempted by Shri Patel to show what possible defences in such cases could be taken by the respondent No. 1 in case the Civil Suit would have been filed. However, it is not necessary to discuss all those defences in this judgement. The question is whether on the facts and the circumstances of the case, the writ petition should be dismissed with direction to the petitioner to file a Civil Suit for recovery of the amount.

13. The cases which have been cited by Shri A.J. Patel have been examined and those cases, to my mind, are distinguishable on facts.

14. Suganmal Vs. State of Madhya Pradesh AIR 1965 SC 1740 the apex court held "that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The

aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in exercise of writ jurisdiction." It is therefore clear from this verdict of the Supreme Court that normally writ petitions should not be entertained granting relief of refund of money and the aggrieved party should claim relief before the Civil Court. However, this observation is distinguishable because in the instant case before me for the first time the petitioner is not claiming through this writ petition refund of amount. On the other hand in the first set of litigation before the Collector and Director of Municipalities, the petitioner obtained orders for refund of amount against the respondent No. 1. The order of the Director of Municipalities has not been challenged by the respondent No. 1 so far through any writ petition. A Division Bench of this Court in between the same parties directed the Collector to exercise his powers under Section 258 of the Act, and pass such orders in accordance with law as it deemed fit. Acting upon that direction the Collector had passed order against the respondent No. 1 which was confirmed in appeal by the Director of Municipalities. There can be no justification for this court to go against the directions of the Division Bench in the aforesaid case which was a case between the same parties. For this reason also there cannot be any direction to the petitioner to approach the competent court i.e. the Civil Court.

15. In addition to this distinction the apex court in Burmah Construction Co. Vs. State of Orissa (1962) Supp. 1 SCR 242 (AIR 1962 SC 1320) observed that "the High Court normally does not entertain a petition under Article 226 of the Constitution to enforce a civil liability arising out of a breach of contract or tort to pay any amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under Art. 226 of the Constitution against the State to enforce a statutory obligation." It is thus clear from this verdict of the apex court that there is no absolute prohibition to entertain the petition under Article 226 of the Constitution of India for payment of money against the State or against an officer of the State. According to apex court sometimes orders for payment of money may be passed in a petition under Article 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation. Thus in

order to ensure compliance of statutory obligation in some cases orders for refund of money can be passed against the State as well as against an officer of the State where violation of statutory obligation is established.

16. In the instant case prima facie violation of statutory obligation is established in the sense that the Resolution under Section 258(1) of the Act was not found sustainable and direction to maintain status quo ante was passed by the Collector keeping in view the directions of a Division Bench of this court in Special Civil Application No. 4795 of 1998 decided on 29.9.1998. If the property tax was realised in breach of the provisions of the Act and the Resolution under Section 258(1) of the Act was found not sustainable by the Collector and he directed to restore status quo ante, he could have done so.

17. In Parshottambhai G. Chavda Vs. State of Gujarat 1998(1) G.L.H. 519 the Full Bench of this court considered the scope of Section 258 of the Act and has categorically held that the power of the Collector to suspend the Resolution passed by the Municipality is not limited to resolution which is not implemented but the Collector can suspend the Resolution which has been implemented and he may also direct the restoration of the position ante. The Full Bench overruled the earlier decision of this court in H.H. Parmar Vs. Collector, Rajkot (1979) 20 G.L.R. 97. It is thus clear from the Full Bench decision of this court that under Section 258 of the Act the Collector has power to undo the Resolution which has already been implemented and while doing so he can also direct restoration of the position ante. These cases were considered by the Division Bench in Special Civil Application No. 4795 of 1998. This was a decision in the matter between the same parties who are parties in this writ petition before me. The Division Bench in this case ultimately directed the Collector to exercise his power under Section 258 of the Gujarat Municipalities Act in the light of the Full Bench decision rendered by this court in Parshottambhai G. Chavda (supra) and pass such orders in accordance with law as it deemed fit after hearing both the sides on the question of refund of amount of Rs. 23,62,500/- to F.C.I. If such direction was given by the Division Bench and the Collector passed the order in accordance with law then the order for refund which was confirmed in appeal by the Director of Municipalities cannot be said to be illegal. Moreover these two orders have not been quashed by any court so far.

18. A belated controversy has been tried to be raised in the counter affidavit dated 6.10.1999 where it was mentioned by the respondent No. 1 that the amount was paid with an open eye and based on mutual understanding that it was paid towards welfare funds and it was utilised for the welfare of the people of Viramgam town. This belated stand cannot be accepted because the Collector in his order dated 5.1.1999 has specifically held that the amount was paid by the Food Corporation of India towards property tax and the same nature of payment was accepted in appeal by the Director of Municipalities. It is, therefore, not desirable in this writ petition to adjudicate that the amount was not paid by the petitioner to the respondent No. 1 as property tax but as amount towards welfare fund.

19. The second case relied upon by Shri A.J. Patel was D.R. Mills Vs. Commr. Civil Supplies air 1976 S.C. 2243. This case is also distinguishable on facts. Here the administrative surcharge was paid voluntarily by the appellant. On these facts, the apex court held that it would not be justified in exercising jurisdiction in favour of the appellants who voluntarily paid the administrative charges. Shri Patel argued that since the payment was made by the petitioner to the respondent No. 1 voluntarily, no order for refund can be passed. As already pointed out earlier that in this writ petition the nature of payment made by the petitioner to the respondent No. 1 is not to be adjudicated. It has been adjudicated by the Collector as well as by the Director of Municipalities and liability has been fixed against the respondent No. 1. So there is no justification in accepting the contention that the amount was paid voluntarily, rather it was a case of payment of property tax under mistake that the Corporation's godowns were situated within the limits of the Nagarpalika. The Collector as well as the Director of Municipalities in unambiguous terms held that in this case the godowns of Food Corporation of India are beyond Viramgam Nagarpaliaka's limit and therefore Viramgam Nagarpalika cannot collect any property tax and the tax so collected from the F.C.I. is against the rules. The Director of Municipalities in his judgement has also mentioned that the advocate of the Nagarpalika accepted that the F.C.I. godowns are not falling within the limits of the Nagarpalika. That means the godowns are outside the limits of Nagarpalika. It was further mentioned that the Deputy President of the Nagarpalika in his letter dated 2.11.1995 had also stated that the godowns are outside the limits of the Nagarpalika. There was, thus, enough

evidence for holding that the godowns of the F.C.I. were beyond the limits of the Nagarpalika and if property tax was realised it was in violation of the statutory provisions of the Gujarat Municipalities Act.

20. Similarly the case of D. Cawasji & Co. Vs. State of Mysore AIR 1975 SC 813 relied on by Shri Patel is also distinguishable on facts. In this case the writ petition was filed for refund of amount. In the earlier writ petition the refund of amount was not claimed. On these facts the High Court dismissed the writ petition and the apex court did not interfere in the judgement of the High Court dismissing the writ petition and directing the petitioners to resort to the remedy of suit. In the case before me no direction can be given to the petitioner to file civil suit because the petitioner is not for the first time claiming refund of the amount of property tax paid by it to the respondent No. 1 through this writ petition. On the other hand the purpose of this petition is to seek compliance of the orders of the Collector and the Director of Municipalities which have become final and which have not been complied with by the respondent No. 1 despite several letters dated 8.1.1999, 15.1.1999 and 27.1.1999.

21. The case of Anath Bandhu Vs. Dominion of India AIR 1955 Calcutta 626 is likewise distinguishable. In face of the concurrent findings of the Collector as well as the Director of Municipalities given in pursuance of the directions of the Division Bench of this Court it would be acting against the settled judicial precedents if a single Judge, in the face of the directions of the Division Bench to the Collector to decide the question of refund in accordance with law, ignores it and directs the petitioner to file a civil suit. As such no direction can be given on the established facts and circumstances of the case to the petitioner to approach the civil court.

22. On the other hand the apex court in the case of Salonah Tea Company Ltd. vs. The Superintendent of Taxes, Nowgong AIR 1990 SC 772 has held that normally in a case where tax or money has been realised without authority of law, the same should be refunded and in an application under Art. 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or to

any third party. Thus, according to this decision writ petition can be entertained for refund of tax collected without any authority of law. In the case before me property tax was realised without authority of law inasmuch as the godowns of the petitioner were not situated within the limits of Nagarpalika and the subsequent Resolution of the Nagarpalika under Section 258 of the Gujarat Municipalities Act was not found sustainable. Further as observed earlier it is not a case where this petition has been filed for refund of the amount of tax paid by the petitioner to the respondent No. 1, rather it has been filed for ensuring and enforcing compliance of the order of the Collector passed in compliance of the orders of the Division Bench of this court which was confirmed by the Director of Municipalities.

23. Similarly in State of Madhya Pradesh Vs. Bhailal Bhai AIR 1964 SC 1006 the apex court considered the question of validity of payment of sales tax and consequent refund under Section 72 of the Contract Act. It observed that where sales tax assessed and paid by the dealer is declared by a competent court to be invalid in law, the payment of tax already made is one made under a mistake within Section 72 of the Contract Act and so the Government to whom the payment has been made by mistake must in law repay it. In this respect, the High Court has, in exercise of its jurisdiction under Article 226 of the Constitution of India, power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law.

24. In face of these two verdicts of the apex court it is difficult to accept the contention of Shri A.J. Patel that the mistaken payment made whether on account of mistake of fact or law cannot be ordered to be refunded through an order in a writ petition under Article 226 of the Constitution.

25. In view of the aforesaid discussion there is no force in the second preliminary objection that the petitioner has alternative remedy by filing civil suit and the petitioner should be directed to file a civil suit.

26. Likewise, there is force in the third objection that the petition under Article 226 of the Constitution cannot be substitute for recovery proceedings or for execution proceedings. Actually on the special facts and circumstances of the case, this court in exercise of writ

jurisdiction will neither act to pass order for initiation of recovery proceedings nor will it act as an executing court.

27. It was also contended by Shri Patel that the order of the Collector is incapable of compliance because it is an enabling order. I do not find any force in this contention. Neither the order of the Collector nor the order of the Director of Municipalities is an enabling order. Shri Patel however pointed out that an amount of 31% has been paid by the respondent to Ganesh Enterprises as per F.C.I.'s letter and since no adjudication has been made by the Collector or by the appellate authority, hence the amount is not refundable. The order of the Collector dated 5.1.1999 shows that this was a disputable question and it was not proper for him to enquire into the matter, hence, he left the matter open and directed that whether F.C.I. had instructed to pay 31% of the amount to M/s. Ganesh Enterprises will be decided by a court/office in future and at that time Nagarpalika will pay the amount as per the judgement hence it is not required to be decided at this stage. From this direction of the Collector it seems that the Nagarpalika can dispute this matter before the competent civil court and if it succeeds it can recover the amount from the F.C.I.. The order is therefore neither imperfect nor an enabling order. Moreover, this point should have been raised before the appellate authority. The appellate authority confirmed the order of the Collector and as such this court in a writ petition filed by the F.C.I. cannot hold that the orders of the two authorities below are invalid on this count. The respondent No. 1 should have challenged the aforesaid orders through a separate writ petition which has not been done so far.

28 After rejecting the preliminary objections raised by Shri A.J. Patel for respondent No. 1 it has now to be seen what relief is to be granted to the petitioner in this writ petition. As pointed out in the foregoing portion of this judgement, no direction can be issued in the nature of mandamus commanding the Collector, Ahmedabad, to recover the amount of Rs. 23,62,500/- as arrears of land revenue under the provisions of the Bombay Land Revenue Code. Thus, relief (B) cannot be granted.

29. So far as relief (A) is concerned since it has already been ordered by the Collector as well as by the Director of Municipalities that the respondent No. 1 has to refund an amount of Rs. 23,62,500/- to the petitioner which was wrongly realised as property tax, no further

direction to the respondent No. 1 for refund of the above amount need be passed in this writ petition. That would be a futile exercise. The order of the two authorities in favour of the petitioner for the aforesaid amount was passed keeping in view the directions of the Division Bench of this Court in Special Civil Application No. 4795 of 1998 decided on 29.9.1999. In the same relief prayer has been made for awarding interest at the rate of 24 per cent per annum with effect from 4.10.1995 till the amount is actually paid. However, no interest can be awarded in this writ petition inasmuch as interest was neither awarded by the Collector in his order dated 5.1.1999 nor by the Director of Municipalities in the order dated 26.5.1999. This court in these circumstances for the first time cannot award interest at the rate of 24 per cent per annum. It was not argued how the petitioner is claiming interest at this rate over the amount paid. Interest can be awarded under a contract or usage or custom. No contract for payment of interest as damages has been pleaded. Neither any usage nor custom for payment has been pleaded. Consequently the claim of interest for the first time cannot be accepted and granted in this writ petition. Thus, relief (A) cannot be granted.

30 So far as relief (C) is concerned it also cannot be granted in this writ petition because such relief was already granted by the Collector and the Director of Municipalities. For interest at the rate of 24% no direction can be given by this court for the reasons given while discussing relief (A). The learned counsel for the petitioner however contended that under relief (D) this court may grant such relief in moulded form as it thinks fit. His contention has been that the two authorities namely the Collector and the Director of Municipalities have already passed orders against the respondent No. 1 to refund the amount but they are not complying with the same and as such for seeking compliance of the said two orders suitable order may be passed in this writ petition. To this Shri A.J. Patel contended that the orders of the two authorities cannot be got complied with under the orders of this court because this court will not implement the orders of the two authorities nor it will execute the orders of the two authorities. However, in the peculiar facts and circumstances of the case, suitable orders in moulded form have to be passed. The reason is that the orders of the two authorities cannot be permitted to remain as waste papers. The order of the Collector was passed under Section 258 of the Act which inter alia provides that if in the opinion of the Collector the execution of

any order or resolution of a municipality is causing or likely to cause injury or annoyance to the public or to lead to a breach of the peace or is unlawful, he may by order in writing under his signature suspend the execution or direct the municipality to restore the position in which it was before the commencement of the resolution. Sub-section (3) of Section 258 of the Act further provides that against the order made by the Collector under sub-Section (1) the municipality may prefer appeal to the State Government within 30 days from the date on which it receives a copy of the order. The State Government may on such appeal being preferred rescind the order or may revise or modify or confirm the order or direct that the order shall continue to be in force, with or without modification, permanently or for such period as it may specify.

31. The power of the Collector under Section 258(1) of the Act is therefore clear that the Collector can suspend the resolution of the municipality if it is causing or is likely to cause injury or annoyance to the public or is unlawful. The Full Bench of this court as stated earlier, in Parshottambhai's case (supra) did consider the scope of Section 258 of the Act and has held that the power of the Collector to suspend resolution passed by the municipality is not limited to the resolution which is not implemented but the Collector can suspend the resolution which has been implemented and he can also direct the restoration of position ante. This view of the Full Bench was followed by a Division Bench of this Court in F.C.I. Vs. Viramgam Nagarpalika in Special Civil Application 4795 of 1998 decided on 29.9.1998. It was a decision inter parties and is binding upon the parties even in this writ petition. It has been held by the Division Bench in this case that the Collector has under Section 285 of the Act power to undo the resolution which has already been implemented and while doing so he can also direct restoration of the position ante. The effect of this observation of the Division Bench of this court as well as Full Bench of this court would be that the Collector has power to suspend a resolution which has not been implemented and can restore the status quo ante. On the facts and circumstances of this case if the Collector came to the conclusion that he has power to order Viramgam Municipality to refund the amount collected illegally by the Nagarpalika from the F.C.I. he committed no wrong and as a consequence of this finding of the Collector he can restore the position ante. That means he can direct the municipality to refund the amount of Rs. 23,62,500/- to the petitioner. The order to restore the position

ante is not only to be passed by the Collector but it has also to be enforced by him. The order passed by the Collector, in appeal under sub-Section (3) of Section 258 of the Act, was confirmed by the appellate authority. Now on the peculiar facts and circumstances of the case since the order to restore the position ante has been interpreted by a Division Bench of this court in Special Civil Application No. 4795 of 1998 decided on 29.9.1998 that the Collector can pass such orders in accordance with law after hearing the parties regarding refund of grant of Rs. 23,62,500/- it would mean that the order of the Collector and the Director of Municipalities was passed in accordance with law namely under Section 258(1) and (3) of the Act read with directions give by this court. Section 258 expressly did not contemplate situation where refund of an amount can be ordered and it is for this reason that there is no provision in the Act for execution of such order. If there is no provision for execution of such order even then the order has to be enforced by the Collector and he has to restore the position which stood before the Resolution under Section 258 of the Act was passed by the municipality. The Collector has also made observations in the order that looking to the case paper it does not seem that any resolution or order was passed regarding taking the said amount from F.C.I. by Viramgam Nagarpalika. He further observed that it seems that payment of said amount was made only by correspondence. In view of this observation also he was justified for issuing directions for refund of the amount. It is therefore for the Collector to restore the position ante and he has to enforce this order which was duly confirmed by the Director of Municipalities in appeal. The Collector was approached by the petitioner for enforcement of his order through two letters dated 9.2.1999 and 18.2.1999 parts of annexure-D but no action has been taken by the Collector so far. It therefore amounts to inaction in discharging the duties by a public officer and as such writ of mandamus has to be issued to the Collector to enforce his order for refund of property tax to the petitioner in the way he likes. He can in the first instance issue notice to the Nagarpalika respondent No. 1 to pay the amount within a fixed time and in case of default on the part of the Nagarpalika he can proceed to attach the properties of the Nagarpalika and sell the same for realisation of the amount of Rs. 23,62,500/and pay the same to the petitioner. Beyond this, no other relief can be granted to the petitioner.

32. In view of the above discussion, the writ petition succeeds in part only. The respondent No. 2

Collector, Ahmedabad, is directed to recover the sum of Rs.. 23,62,500/- from the respondent No. 1 in the manner indicated in the foregoing portion of this judgement and pay the same to the F.C.I. In the facts and circumstances of the case, there shall be no order as to costs.

As a consequence of the above order in the Special Civil Application No. 2250 of 1999, the Civil Application seeking further time to deposit the amount in this court has become infructuous and is rejected as infructuous.

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[pkn]